Lee Nyan Hon & Bros Sdn Bhd v Metro Charm Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A-02–515 OF 2007
LOW HOP BING, HELILIAH AND ABDUL MALIK ISHAK JJCA
7 SEPTEMBER 2009

Landlord and Tenant — Rent — Non-payment of — Trespass — Landlord sealed off land and demolished buildings on it — Whether remedy of self-help available to landlord when tenant breached tenancy agreement — Whether tenant estopped from raising illegality when notice of termination based on failure to pay rental given — Specific Relief Act 1950 ss 7 & 8

By way of a tenancy agreement dated 5 February 2001 ('the agreement'), Lee Nyan Hon & Bros Sdn Bhd ('the defendant') had rented out a piece of vacant land in Perak ('the land') to Metro Charm Sdn Bhd ('the plaintiff') for a term of three years commencing 15 December 2000 at a monthly rental of RM3,500. The purpose of the tenancy was to set up an entertainment outlet, upon the terms and conditions contained in the agreement. The crucial terms of the agreement were cll 5.5 and 5.9 of the agreement. Under cl 5.5, the plaintiff as tenant agreed to comply with all statutes, ordinances or regulations affecting the use of the land and also agreed that the erection of all structures on the land would comply with the requirements of any authority having jurisdiction on the land. Pursuant to cl 5.9 the plaintiff agreed not to use the land for any unlawful purpose. Thereafter the plaintiff constructed a building on the land, to set up a 'Balinese concept café' but did not obtain planning approval from the Dewan Bandaraya Ipoh (DBI) before the building was constructed. There was also no entertainment licence issued to the plaintiff to run and manage a café in the building constructed by the plaintiff. On 19 March 2001 the defendant terminated the tenancy for non-payment of rental. Thereafter the defendant as landlord entered into the land without a court order and sealed it off. It then proceeded to demolish all the buildings and structures on the land with cranes and bulldozers. The plaintiff then commenced civil proceedings against the defendant under the Specific Relief Act 1950 ('the Act'). The plaintiff contended that under the tenancy agreement it was an 'occupier' of the land as defined in s 7(3) of the Act, and that under s 7(2) of the Act the right of the landlord to recover possession of tenanted property is to be exercised only by way of a court action. Thus the plaintiff submitted that when the defendant forcibly entered the land and destroyed the plaintiff's property without a court order, the plaintiff was entitled to claim damages from the defendant on the basis of ss 7

and 8 of the Act. The High Court allowed the plaintiff's claim and ordered the defendant to pay the plaintiff RM944,228.84 as damages for trespass but dismissed the plaintiff's claim for exemplary and aggravated damages. This was the defendant's appeal against that decision. At the same time the plaintiff had also cross-appealed against the dismissal of its claim for exemplary and aggravated damages. The defendant submitted that the plaintiff was in breach of its covenants under the agreement in that it had not obtained the approval of the DBI to erect the building on the land and it had failed to obtain licences from the authorities for the purpose of carrying on the entertainment outlet on the land. As such the defendant maintained that the plaintiff was barred from instituting an action against the defendant. The plaintiff argued that the defendant's notice of termination was simply based on the failure to pay rental and nothing turned on the plaintiff's failure to obtain the approval or licences and that therefore the defendant was estopped from raising the illegality issue.

Held, allowing the defendant's appeal and dismissing the plaintiff's cross-appeal with costs:

(1) (per **Low Hop Bing JCA**) Clause 7.1(a) of the agreement, which provides for the default and termination of the agreement, is expressed in clear and unambiguous words. Upon a true construction of this clause there was no doubt that the defendant had legally terminated the agreement by notice in writing and that it was within its right to terminate the agreement (see paras 37 & 41).

(2) (per **Low Hop Bing JCA**) Although s 7(2) of the Act had provided that the landlord can only recover possession of tenanted property by court action, the third condition of this section requires the tenant to be the 'occupier' who continues to remain in occupation of the property or part thereof. In the instant appeal, at the material time, the plaintiff had been served with a temporary stop-work order by the Ipoh City Hall and was therefore not in occupation of the land or an 'occupier' under s 7(2) of the Act. Further, being in breach of cll 5.5 and 5.9 of the agreement the plaintiff could not be lawfully in occupation of the land. Since the situation set out in s 7(2) is inapplicable, the plaintiff was precluded from availing itself of the remedy of recovering possession of the land under s 8(1). The trial judge had erred in law in invoking ss 7 and 8 of the Act (see paras 28–31).

(3) (per **Low Hop Bing** and **Abdul Malik Ishak JJCA**) The evidence had established that the plaintiff was in breach of the express covenants contained in cll 5.5 and 5.9 of the agreement. Since the plaintiff was the party in breach of the law, by its failure to obtain building approval and licences to carry out entertainment business in the building it

constructed, it was precluded from pursuing its action against the defendant by relying on its own illegal acts: *ex turpi causa non oriter actio*. No court would enforce an illegal contract or allow itself to be made the instrument of enforcing obligations arising from an illegal transaction, even if the defendant had not pleaded the illegality (see paras 18–21 & 64–66).

(4) (per **Low Hop Bing** and **Abdul Malik Ishak JJCA**) For the plaintiff to recover damages from the defendant it must prove the defendant's liability, but the plaintiff failed to prove the defendant's liability and that being the case, the plaintiff was not entitled to any damages be it exemplary or aggravated (see paras 33 & 75–80).

(5) (per **Abdul Malik Ishak JCA**) There was no proper evaluation of the evidence by the High Court in the present case thereby warranting appellate interference in favour of the defendant as the landlord (see para 61).

(6) (per **Abdul Malik Ishak JCA**) This appeal concerned the illegal performance of a legal contract. Given the specific and admitted breaches of the plaintiff as the tenant, the plaintiff was disentitled to seek specific relief under the Specific Relief Act 1950 (see para 72).

[Bahasa Malaysia summary

Menerusi perjanjian sewa bertarikh 5 Februari 2001 ('perjanjian tersebut'), Lee Nyan Hon & Bros Sdn Bhd ('defendan') menyewakan sebidang tanah kosong di Perak ('tanah tersebut') kepada Metro Charm Sdn Bhd ('plaintif') bagi tempoh tiga tahun bermula dari 15 Disember 2000 pada sewa bulanan sebanyak RM3,500. Tujuan penyewaan tersebut adalah untuk mendirikan sebuah pusat hiburan, berdasarkan terma dan syarat perjanjian tersebut. Terma-terma penting perjanjian tersebut adalah klausa 5.5 dan 5.9. Di bawah klausa 5.5, plaintif sebagai penyewa bersetuju mematuhi kesemua statut, ordinan atau peraturan berkaitan dengan penggunaan tanah dan juga bersetuju bahawa pembinaan kesemua struktur atas tanah tersebut harus menepati keperluan-keperluan pihak berkuasa yang mempunyai kuasa atas tanah tersebut. Berikutan klausa 5.9 plaintif bersetuju tidak menggunakan tanah tersebut untuk tujuan yang menyalahi undang-undang. Kemudiannya, plaintif mendirikan sebuah bangunan atas tanah tersebut, bagi sebuah 'Balinese concept cafe' tetapi tidak mendapat kebenaran perancangan daripada Dewan Bandaraya Ipoh (DBI) sebelum mendirikan bangunan tersebut. Juga tiada lesen hiburan yang dikeluarkan kepada plaintif untuk menjalan dan mengendali sebuah kafe di bangunan yang dibina plaintif. Pada 19 Mac 2001 defendan menamatkan sewaan tersebut kerana tidak membayar sewa. Kemudiannya, defendan sebagai tuan tanah, masuk ke tanah tersebut tanpa perintah mahkamah dan menyita tempat itu. Defendan kemudiannya

merobohkan bangunan dan struktur di atas tanah tersebut menggunakan kren dan jentolak. Plaintif kemudiannya memulakan tindakan sivil terhadap defendan di bawah Akta Relief Spesifik 1950 ('Akta'). Plaintif menghujah bahawa di bawah perjanjian sewaan tersebut, plaintif merupakan 'occupier' tanah tersebut seperti yang ditakrifkan dalam s 7(3) Akta dan di bawah s 7(2) Akta menyatakan bahawa hak tuan tanah untuk mengambil semula hartanah yang disewakan hanya boleh dilaksanakan menerusi tindakan mahkamah. Maka, plaintif menyatakan bahawa apabila defendan masuk ke tanah tersebut secara paksa dan memusnahkan hartanya tanpa perintah mahkamah, plaintif berhak menuntut ganti rugi daripada defendan atas dasar ss 7 dan 8 Akta. Mahkamah Tinggi membenarkan tuntutan plaintif dan memerintahkan defendan membayar plaintif RM944,228.84 sebagai ganti rugi menceroboh tetapi menolak tuntutan plaintif bagi ganti rugi teladan dan tambahan. Ini merupakan rayuan defendan terhadap keputusan tersebut. Pada masa yang sama plaintif juga merayu balas terhadap penolakan tuntutannya atas ganti rugi teladan dan tambahan. Defendan menyatakan bahawa plaintif memungkiri perjanjian tersebut apabila plaintif gagal mendapat lesen daripada pihak berkuasa untuk menjalankan pusat hiburan di atas tanah tersebut. Maka, defendan menegaskan bahawa plaintif dihalang mengambil tindakan terhadap defendan. Plaintif menghujah bahawa notis penamatan defendan hanyalah berdasarkan kegagalan membayar sewa dan bukannya atas alasan kegagalan plaintif mendapat kebenaran atau lesen dan oleh itu defendan diestop daripada membangkitkan isu kepenyalahan undang-undang.

Diputuskan, membenarkan rayuan defendan dan menolak rayuan balas plaintif dengan kos:

(1) (oleh **Low Hop Bing HMR**) Klausa 7.1(a) perjanjian tersebut yang memperuntukkan kemungkiran dan penamatan perjanjian tersebut, dinyatakan dengan jelas dan nyata. Dalam pentafsiran sebenar klausa ini, tidak diragui bahawa defendan telah menamatkan perjanjian tersebut secara sah melalui notis bertulis dan defendan berhak berbuat demikian (lihat perenggan 37 & 41).

(2) (oleh **Low Hop Bing HMR**) Walaupun s 7(2) Akta memperuntukkan bahawa tuan tanah hanya boleh mengambil semula harta yang disewakan melalui tindakan mahkamah, syarat ketiga seksyen ini memerlukan penyewa itu menjadi 'occupier' yang berterusan mendiami hartanah tersebut atau sebahagian darinya. Dalam rayuan ini, pada masa yang material, plaintif telah diserahkan perintah berhenti kerja sementara oleh Majlis Perbandaran Ipoh dan oleh itu tidak mendiami tanah tersebut atau merupakan 'occupier' di bawah s 7(2) Akta. Selanjutnya, dengan memungkiri klausa 5.5 dan 5.9 perjanjian tersebut

plaintif tidak boleh mendiami tanah tersebut secara sah. Memandangkan situasi di bawah s 7(2) tidak boleh diguna pakai, plaintif dihalang daripada mendapatkan remedi mengambil semula tanah tersebut di bawah s 8(1). Hakim bicara khilaf dari segi undang-undang dalam mengguna pakai ss 7 dan 8 Akta (lihat perenggan 28–31).

(3) (oleh **Low Hop Bing** dan **Abdul Malik Ishak HHMR**) Keterangan menunjukkan bahawa plaintif memungkiri klausa 5.5 dan 5.9 perjanjian tersebut. Memandangkan plaintif yang melanggar undang-undang tersebut, dengan kegagalannya mendapatkan kebenaran membina dan lesen menjalankan perniagaan hiburan di bangunan tersebut, plaintif dihalang meneruskan tindakannya terhadap defendan dengan bersandarkan pada tindakannya sendiri yang menyalahi undang-undang: *ex turpi causa non oriter actio*. Tiada mahkamah yang akan menguatkuasakan kontrak yang menyalahi undang-undang atau membenarkan mahkamah itu sendiri menjadi alat menguatkuasakan tanggungjawab berbangkit daripada transaksi yang salah di sisi undang-undang, walau defendan tidak memplid kepenyalahan undang-undang tersebut (lihat perenggan 18–21 & 64–66).

(4) (oleh **Low Hop Bing** dan **Abdul Malik Ishak HHMR**) Bagi plaintif mendapatkan ganti rugi daripada defendan, plaintif harus membuktikan liabiliti defendan, tetapi plaintif gagal membuktikannya dan oleh itu, plaintif tidak berhak ke atas sebarang ganti rugi, sama ada teladan atau tambahan (lihat perenggan 33 & 75–80).

(5) (oleh **Abdul Malik Ishak HMR**) Tidak terdapat penilaian sempurna terhadap keterangan oleh Mahkamah Tinggi dalam kes ini dan oleh itu, mewajarkan campur tangan di mahkamah rayuan bagi pihak defendan sebagai tuan tanah (lihat perenggan 61).

(6) (oleh **Abdul Malik Ishak HMR**) Rayuan ini adalah berkenaan perlaksanaan yang menyalahi undang-undang berkenaan kontrak yang sah. Berdasarkan kemungkiran tertentu dan yang diakui oleh plaintif sebagai penyewa, plaintif tidak berhak memohon relief spesifik di bawah Akta Relief Spesifik 1950 (lihat perenggan 72).]

Notes

For cases on non-payment of rent, see 9 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1360–1361.

Cases referred to

An Arbitration, Re v Mahmoud and Ispahani [1921] 2 KB 716, CA (refd)
Archbolds (Freightage) Ltd v S Spanglett Ltd (Randall, third party) [1961] 1 All ER 417, CA (refd)

Benmax v Austin Motor Co Ltd [1955] 1 All ER 326, HL (refd)
Bradford City Metropolitan Council v Arora [1991] 2 QB 507, CA (refd)
Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 MLJ 356, SC (refd)
Clunis v Camden & Islington Health Authority [1998] QB 978, CA (refd)
Drane v Evangelou & Ors [1978] 1 WLR 455, CA (refd)
Dr Harjit Singh v Suhaimi bin Samar & Anor [1995] 2 AMR 1988, HC (refd)
Er Eng Hock & Anor v New Kim Eng Etc [2000] 1 CLJ 289, HC (refd)
Gimstern Corp (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd [1987] 1 MLJ 302, SC (refd)
Great Western Railway and Midland Railway v Bristol Corporation (1918) 87 LJ Ch 414 (refd)
Hay or Bourhill v Young [1943] AC 92, HL (refd)
Holman et al' v Johnson, alias Newland (1775) 98 ER 1120; 1 Cowp 341 (refd)
L Schuler AG v Wickman Machine Tool Sales Ltd [1974] AC 235, HL (refd)
Leasing Corporation Sdn Bhd v Indah Lestari Sdn Bhd [2007] 7 MLJ 506, CA (refd)
Metro Charm Sdn Bhd v Lee Nyan Hong & Brothers Sdn Bhd & Anor [2007] 5 MLJ 272, HC (refd)
New Zealand Shipping Co Ltd v Socit Des Ateliers Et Chantiers de France [1919] AC 1, HL (refd)
Nur Islam Worldwide Industries Sdn Bhd v Yee Kok Sum [2001] 7 CLJ 494, HC (refd)
Pet Far Eastern (M) Sdn Bhd v Tay Young Huat & Ors [1999] 5 MLJ 558, HC (folld)
Rasidin bin Partorjo v Frederick Kiai [1976] 2 MLJ 214, FC (refd)
Renal Link (KL) Sdn Bhd v Dato' Dr Harnam Singh [1997] 2 MLJ 373, CA (refd)
Rookes v Barnard & Ors [1964] AC 1129, HL (refd)
Sallows v Griffiths [2001] FSR 15, CA (refd)
Scott v Brown, Doering, McNab & Co [1892] 2 QB 724, CA (refd)
SME Aerospace Sdn Bhd v STEYR Mannlicher (M) Sdn Bhd [2006] 3 MLJ 462; [2006] 5 CLJ 121, HC (refd)
Su Wee Lip @ Philip Su v Haji Lassim Abdul Rahman [2009] 1 MLJ 580, CA (refd)
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd & Ors (2004) 219 CLR 165 (refd)
Topps Co Inc, The v Mally Jaya Sdn Bhd [1998] 5 MLJ 744, HC (refd)

Legislation referred to

Companies Act 1965 s 125(1)
Contracts Act 1950 ss 24, 33
National Land Code ss 213, 221, 222, 235, 316
Road and Rail Traffic Act 1933 [UK] s 1(1)
Specific Relief Act 1950 ss 7, 7(1), (2), (3), 8, 8(1)

Appeal from: Civil Suit No 22–76 of 2001 (High Court, Ipoh)

N Chandran (Philip Koh, Chan Kok Keong, Yap Boon Hau, Leong Cheok Keng and Ranjan Chandran with him) (Leong & Tan) for the appellant.
Vijaya Segaran (Lee Soon Ming and Danial Rahman with him) (Maxwell, Kenion, Cowdy & Jones) for the respondent.

Low Hop Bing JCA:

APPEAL AND CROSS-APPEAL

[1] On 21 May 2007, the learned judge of the Ipoh High Court:

(a) allowed the claim of the respondent ('the plaintiff') and ordered the appellant ('the defendant') to pay the plaintiff the sum of RM944,228.84, as damages for trespass, together with interest at 8%pa from the date of judgment to the date of realisation, and costs, but dismissed the plaintiff's claim for exemplary and aggravated damages; and

(b) dismissed with costs the defendant's counterclaim against the plaintiff.

[2] The defendant has now appealed against the decision of the High Court given in favour of the plaintiff.

[3] On the other hand, the plaintiff has filed a cross-appeal against the dismissal of the plaintiff's claim for exemplary and aggravated damages.

FINDING OF FACTS

[4] The narrative of the relevant facts, as found by the learned judge after a full trial, may be unfolded below.

[5] Pursuant to a tenancy agreement dated 5 February 2001 ('the agreement') the defendant as landlord let to the plaintiff, as tenant, the vacant land held under HS(D) KA 81943, No PT 162011, in the mukim of Hulu Kinta, district of Kinta, Perak ('the land') for a term of three years commencing 15 December 2000 at a monthly rental of RM3,500, with an option to renew for a further period of two years. The purpose of the tenancy was to set up an entertainment outlet, upon the terms and conditions contained in the agreement.

[6] On 2 February 2001, the plaintiff paid the defendant a sum of RM7,000 being the rental for two months viz December 2000 and January 2001; and a further sum of RM21,000 as security deposit.

[7] Clause 5.5 of the agreement contains a covenant that the plaintiff shall comply with all statutes, ordinances or regulations, present or future, affecting or relating to the use of the land, and that the erection of all structures on the land shall comply with the requirements of any authority having jurisdiction over or in respect of the land (a reference hereinafter to a clause is a reference to that clause in the agreement). A B

[8] Pursuant to cl 5.9, the plaintiff covenanted, inter alia, not to use the land for any unlawful purpose.

[9] The defendant had on 28 March 2001 taken possession of the land and demolished the structures which the plaintiff had caused to be erected thereon. C

[10] Other facts will appear under the relevant issues for determination later in our judgment. D

THE PLAINTIFF'S COVENANTS

[11] Defendant's learned counsel Datuk N Chandran (assisted by Mr Philip Koh, Mr Chan Kok Leong, Mr Yap Boon Hau, Mr Leong Cheok Keng and Mr Ranjan Chandran) submitted for the defendant that the plaintiff has failed to fulfil its covenants in that the plaintiff had not obtained the approval of the relevant authority to erect the structures on the land; and the licences from the authorities for the purpose of carrying on the entertainment outlet. E F

[12] Mr Vijaya Segaran (Mr Lee Soon Ming and Mr Danial Rahman with him) argued that the plaintiff's notice of termination was simply based on a failure to pay rental, and nothing turned on the plaintiff's failure to obtain the approval or licences, as a result of which the defendant was estopped from raising the illegality issue. G

[13] The above conflicting submissions call for the determination of the following question: H

> Upon a true construction of cl 5.5 and cl 5.9 of the tenancy agreement, is the plaintiff in breach of the covenants pertaining to compliance with all statutes, ordinances or regulations, present and future, affecting or relating to the use of the land, and not to use the land for any unlawful purpose, so as to bar the plaintiff from bringing an action under the agreement against the defendant? I

[14] The determination of this question revolves around the construction of the covenants contained in cl 5.5 and cl 5.9, in the light of the evidence adduced at the trial.

[15] Clause 5.5 and cl 5.9 had been referred to above and would require no repetition here.

[16] In relation to the evidence adduced at the trial, Lee Gim Aik ('PW1'), a director of the plaintiff, testified that:

(a) the business which the plaintiff had carried on in the building structures erected on the land was a Balinese concept Cafe called Bali-Bali Cafe; and

(b) the plaintiff had not obtained the building approval before it commenced the erection thereof.

[17] Cross-examination of PW1 confirmed that:

(a) from the beginning, PW1 was informed by, inter alia, the defendant that erection of building structures on the land must have the permission of Ipoh City Hall which is the local authority entrusted with the task of approving planning and/or construction on site;

(b) for the public house, there was a need for liquior licence, an entertainment licence, and consent from various departments such as Fire Services Department, the Police, the District Offices of Ipoh and Batu Gajah, and the Customs Department to pay the 5% service tax;

(c) the plaintiff was required to comply with the conditions before being allowed to run the Cafe;

(d) after inspection by the Ipoh City Hall, several conditions for business licence had not been fulfilled yet;

(e) in November and December 2000, there was no approved building plan to commence construction of the Cafe; and

(f) when the defendant recovered possession of the land on 28 March 2001, the plaintiff did not have the approved building plans; but merely a 'conditional approved letter' from Ipoh City Hall, which had meanwhile served on the plaintiff a temporary stop-work order which stopped all activities on the land and which still remained in force as at 28 March 2001. Hence, the plaintiff was no longer in occupation of the land.

[18] In our view, the evidence has established that the plaintiff was in breach of the express covenants contained in cl 5.5 and cl 5.9. Being the party in breach of the law, due to its failure to obtain the building approval for the construction of the building structures and the procurement of the licences to carry out entertainment business in the building, the plaintiff is precluded from enlisting the assistance of the court. In other words, the plaintiff's illegal

acts had precluded the plaintiff from pursuing its action: *ex turpi causa non oriter actio*. An action does not arise from a base cause: see *Latin for Lawyers*.

[19] This clear and well recognised legal maxim is founded in good sense. No court will enforce an illegal contract or allow itself to be made the instrument of enforcing obligations arising out of a contract or transaction which is illegal, and the illegality is duly brought to the notice of the court, and the person invoking the aid of the court is himself implicated in the illegality, even if the defendant has not pleaded the illegality. So long as the evidence adduced by the plaintiff proves the illegality, the court will not assist him: per Lindley LJ in *Scott v Brown, Doering, McNab & Co* [1892] 2 QB 724 at p 728. See also s 24 of the Contracts Act 1950.

[20] The plaintiff being the guilty party cannot be permitted to take advantage of its own breach of the express covenants contained in cl 5.5 and cl 5.9 to which the plaintiff has voluntarily subscribed: see eg *Su Wee Lip @ Philip Su v Haji Lassim Abdul Rahman* [2009] 1 MLJ 580 (CA), per Gopal Sri Ram JCA, applying the judgment of Wan Hamzah SCJ who spoke for the (then) Supreme Court in *Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd* [1987] 1 MLJ 320, and that of Lord Atkinson in *New Zealand Shipping Co Ltd v Socit Des Ateliers Et Chantiers de France* [1919] AC 1 (HL).

[21] In the circumstances, our answer to the above question is in the affirmative.

SPECIFIC RELIEF ACT 1950

[22] The defendant complained that the learned trial judge had erred in applying the provisions of ss 7 and 8 of the Specific Relief Act 1950 when, on the facts, they are inapplicable as the plaintiff was at the material time not the occupier of the tenanted property.

(A reference hereinafter to the section is a reference to that section in the Specific Relief Act 1950).

[23] The plaintiff's response is that pursuant to the tenancy agreement, the plaintiff is an 'occupier' as defined in s 7(3); and the defendant had forcibly entered the land and destroyed the plaintiff's property without a court order, in which case, the plaintiff is entitled to claim damages from the defendant, on the basis of ss 7 and 8.

[24] The question for determination under this head is whether the facts, as unfolded above, attract the application of s 7 read with s 8?

[25] These two sections merit reproduction in extenso as follows:

> 7 Recovery of specific immovable property
>
> (1) Subject to subsection (2), a person entitled to the possession of specific immovable property may recover it in the manner prescribed by the law relating to civil procedure.
>
> (2) Where a specific immovable property has been let under a tenancy, and that tenancy is determined or has come to an end, but the occupier continues to remain in occupation of the property or part thereof, the person entitled to the possession of the property shall not enforce his right to recover it against the occupier otherwise than by proceedings in the court.
>
> (3) In subsection (2) 'occupier' means any person lawfully in occupation of the property or part thereof at the termination of the tenancy.
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> 8 Suit by person dispossessed of immovable property
>
> (1) If the person is dispossessed without his consent of immovable property otherwise than in due course of law, he or any person claiming through him may, by suit, recover possession thereof, notwithstanding any other title that may be set up in the suit.
>
> (2) Nothing in this section shall bar any person from suing to establish his title to any such property and to recover possession thereof.
>
> (3) No suit under this section shall be brought against any Government in Malaysia.
>
> (4) No appeal shall lie from any order or decree passed in any suit instituted under this section, nor shall any review of any such order or decree be allowed.

[26] In our view, s 7(1) enables a person entitled to the possession of specific immovable property, eg a landlord, to recover the property in accordance with civil procedural law.

[27] It is significant to note that the landlord's right to recover possession of the tenanted property under s 7(1) is subject to the situation set out in s 7(2) which provides for the specific procedure ie by way of proceedings in court for the recovery of possession of tenanted immovable property against the occupier thereof, and is expressly intended to cover a situation where:

(a) there is a letting of specific immovable property under a tenancy;

(b) the tenancy is determined or has come to an end; and

(c) the occupier continues to remain in occupation of the property or part thereof.

[28] Our courts have consistently held that s 7(2) has relegated the remedy of self-help into oblivion. The right of the landlord to recover possession of tenanted property is to be exercised only by way of a court action: *Dr Harjit Singh v Suhaimi bin Samar & Anor* [1995] 2 AMR 1988 (HC) per Haidar J (later CJ (Malaya)); *Er Eng Hock & Anor v New Kim Eng Etc* [2000] 1 CLJ 289 (HC) per Abdul Malik Ishak J (now JCA); *Nur Islam Worldwide Industries Sdn Bhd v Yee Kok Sum* [2001] 7 CLJ 494 per Zulkefli Makinudin J (now FCJ); *SME Aerospace Sdn Bhd v STEYR Mannlicher (M) Sdn Bhd* [2006] 3 MLJ 462; [2006] 5 CLJ 121 (HC) per Rosnaini Saub JC (now J); and *Metro Charm Sdn Bhd v Lee Nyan Hong & Brothers Sdn Bhd & Anor* [2007] 5 MLJ 272 (HC) per James Foong J (now (FCJ).

[29] Be that as it may, the third condition under s 7(2) requires the tenant to be the 'occupier' who continues to remain in occupation of the property or part thereof. In the instant appeal, as alluded to above, the specific finding of facts was that, at the material time, the plaintiff had been served with a temporary stop-work order by the Ipoh City Hall which stopped all activities on the land, Hence, the plaintiff was no longer in occupation of the land, in which case, the plaintiff was not an 'occupier' under s 7(2). Hence, s 7(2) is inapplicable. Further, the plaintiff had been in breach of the covenants under cl 5.5 and cl 5.9, and so in contravention of the statutes, ordinances or regulations, in which case under s 7(3), the plaintiff could not be lawfully in occupation of the property or part thereof. The learned trial judge has therefore erred in law in invoking ss 7 and 8.

[30] Although s 8(1) enables a person, such as the tenant, who has been dispossessed, without his consent, of immovable property, otherwise in due course of law, to recover, by suit, possession thereof, the dispossession must refer to dispossession of the immovable property pursuant to the situation specifically provided under s 7(2).

[31] However, since the situation set out in s 7(2) is clearly inapplicable, the plaintiff is precluded from availing itself of the remedy of recovering possession thereof under s 8(1).

[32] Hence, we answer the above question in the negative.

DAMAGES

[33] As the plaintiff has failed to establish liability against the defendant,

there is no question of awarding damages, be it exemplary, aggravated or otherwise which the plaintiff sought in the cross-appeal.

TERMINATION OF AGREEMENT

[34] The next and final contention advanced for the plaintiff was that the defendant has failed to comply with the requirements of s 235 of the National Land Code ('s 235'), and so the learned judge had erred in law and in fact in holding that the agreement had been properly terminated.

[35] The defendant maintained that the learned trial judge was correct in concluding that the defendant had lawfully terminated the agreement, in view of the plaintiff's breach of cl 7.1(a) pertaining to the punctual payment of monthly rental. It was further argued that s 235 applies only to a registered tenancy, and not to the agreement herein which had not been registered nor endorsed on the title.

[36] In our view, the question that needs to be addressed hereunder is whether the defendant has properly and lawfully terminated the agreement. This issue must be determined by reference to the trial judge's finding of facts and the true construction of cl 7(1)(a), in the light of s 235.

[37] Clause 7.1(a) provides for default and termination of the agreement. The relevant portion reads:

> DEFAULT AND TERMINATION
>
> 7.1 The landlord and the tenant hereby agree that:
>
> (a) if the monthly rental hereby reserved or any part thereof shall remain unpaid for a period of fourteen days after the same shall have become due and payable in accordance with the covenants for payment herein contained; or
>
> ...
>
> Then in any one … of such events, the landlord shall at any time thereafter be entitled to terminate this agreement by notice in writing to the tenant and forfeit the security deposit paid hereunder but without prejudice to any action or other remedy which the landlord has or might or otherwise could have for the recovery of damages or arrears …

[38] Reverting to the facts, it is to be noted that on 28 February 2001, the plaintiff's cheque for RM3,500 was presented to the defendant for payment of rental for the month of February 2001. When this cheque was presented

for payment on 17 March 2001, there was insufficient fund in the plaintiff's account to meet this payment, resulting in its dishonour. Subsequently, the defendant's solicitors M/s Chan & Associates, by letter dated 19 March 2001 to the plaintiff, terminated the agreement. They declared that by virtue of cl 7.1(a), the defendant is entitled to terminate the agreement as the monthly rental or any part thereof remained unpaid by the plaintiff for a period of 14 days after the same had become due and payable to the defendant by 1 March 2001.

[39] Upon receipt of the letter, the plaintiff's employee immediately proceeded to the defendant's office to pay a sum of RM3,500, but the defendant refused to accept it. On the next day, 28 March 2001, the plaintiff through its solicitors made another attempt to pay the rent. This was again rejected by the defendant on the ground that the agreement had been terminated.

[40] The plaintiff then sued the defendant for breach of contract and trespass.

[41] We note that when the cheque was dishonoured on 17 March 2001, the rental for the month of February 2001 was already outstanding for more than 14 days (from the due date of 15 February 2001). Clause 7.1(a) is expressed in clear and unambiguous words. The intention of the parties contained therein must be given effect. Upon a true construction of cl 7.1(a), there can be no doubt that the defendant was legally entitled to terminate the agreement by notice in writing. The defendant was within its right to terminate the agreement.

[42] Next, s 235 raised for the plaintiff reads:

> Notice before forfeiture
>
> Notwithstanding anything to the contrary contained therein, no person or body shall be entitled to enforce, by action or otherwise, the forfeiture or any lease, sub-lease or tenancy for breach of any of the provisions thereof unless and until that person or body has served on the lessee, sub-lessee or tenant for the time being a notice in writing:
>
> (a) Specifying the particular breach complained of;
>
> (b) If the breach is capable of remedy, requiring him to remedy it; and
>
> (c) In any case other than non-payment of rent requiring him to make compensation in money for the breach.

> And the lessee, sub-lessee or tenant on whom the notice is served has failed, within a reasonable time thereafter, to remedy the breach (if it is capable of remedy) and to make reasonable compensation in money therefor to the satisfaction of that person or body.

[43] Our short answer to the plaintiff's submission is that s 235 applies only to:

(a) registered leases under s 221 of the National Land Code;

(b) registered subleases under s 222 thereof; and

(c) tenancies exempt from registration which have been endorsed on title, under ss 213 and 316 thereof.

[44] This proposition has been succinctly stated by Judith Sihombing in her well-researched book on *The National Land Code, A Commentary* (2002) at para 3454 as follows:

> This section applies to registered leases (s. 221), registered subleases (s. 222), and tenancies exempt from registration which have been endorsed on title (ss. 213 and 316).

[45] We are of the view that the plaintiff's contention on this issue is devoid of merits. The agreement in the instant appeal is outside the language of s 235. The defendant has properly and lawfully terminated it.

[46] In the circumstances, we answer the above question in the affirmative.

CONCLUSION

[47] For reasons given above, the defendant's appeal is allowed. The order of the High Court against the defendant is set aside, and substituted with an order that the plaintiff's claim be dismissed with costs of RM10,000 here and in the court below. Deposit to be refunded to the defendant.

[48] The plaintiff's cross-appeal against the dismissal of the plaintiff's claim for damages, either exemplary, aggravated or otherwise, is dismissed with costs of RM2,000 to the defendant. Deposit to the defendant on account of the fixed costs.

Abdul Malik Ishak JCA:

[49] This judgment concerned Metro Charm Sdn Bhd as the respondent

('the plaintiff') and Lee Nyan Hon & Brothers Sdn Bhd as the appellant ('the defendant'). The defendant as the landlord rented out a piece of vacant land to the plaintiff by way of a tenancy agreement dated 5 February 2001. The recital to the tenancy agreement spelt out the purpose of the tenancy and that was for the setting up of an entertainment outlet based on the terms and conditions that appeared in the said agreement.

[50] Inter alia, it was a term of the tenancy agreement that the plaintiff as the tenant shall comply with all statutes, ordinances or regulations present or future affecting or relating to the use of the vacant land that was tenanted, and the erection of structures shall comply with all requirements which may be given by any authority having jurisdiction or authority over or in respect of the vacant land.

[51] The plaintiff as the tenant also expressly covenanted that the vacant land shall not be used for any unlawful purpose.

[52] These were the crucial terms of the tenancy agreement and this court must give full effect to the clear intention of the parties as manifested in the said agreement. According to Lord Shaw in *Great Western Railway and Midland Railway v Bristol Corporation* (1918) 87 LJ Ch 414 at p 424 that:

> ... experience has shown that the attempt seems to be inevitable in pleader's mind ... to confuse evidence of a writer's intention as such, with the intention conveyed by the words which he employed. The latter alone is legitimate.

[53] Indeed, the 'intention of the parties' is always equated with the meaning of the contract *(Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd & Ors* (2004) 219 CLR 165). And Lord Simon of Glaisdale in *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 at p 263 rightly applied the following pertinent passage in *Norton on Deeds* (1906) at p 43:

> ... the question to be answered always is, 'What is the meaning of what the parties have said?' not, 'What did the parties mean to say?'... it being a presumption juris et de jure ... that the parties intended to say that which they have said.

ANALYSIS

[54] In setting up the entertainment outlet on the vacant land, the plaintiff as the tenant erected the building and set up a 'Balinese concept Cafe' known as 'Bali Bali Cafe'. Sad to say that when the plaintiff constructed the building on the vacant land, it had not obtained the building approval. The plaintiff through Lee Gim Aik testifed that:

> We have not got building approval before we commenced building.

[55] It was a damning piece of evidence against the plaintiff. It must be understood to mean an admission by the plaintiff that it had breached an express covenant under the tenancy agreement. There was no planning approval from the Dewan Bandaraya Ipoh ('DBI').

[56] Again, there was evidence emanating from Lee Gim Aik that the pub at 'Bali Bali Cafe' required liquor licence. There was also the need to secure an entertainment licence and obtain the relevant consents from various departments such as the fire brigade, the police, the district offices of Ipoh and Batu Gajah as well as the customs in order to expedite payment of the 5% service tax. In short, Lee Gim Aik knew that the plaintiff had to comply with all the statutes, ordinances or regulations present or future affecting or relating to the use of the vacant land that the plaintiff tenanted.

[57] The evidence of Lee Gim Aik was detrimental to the plaintiff. There can be no doubt that the plaintiff as the tenant had blatantly flouted the law and was in breach of the express covenants as set out in the tenancy agreement.

[58] There was no prior approval of 'DBI' before the building was constructed. There was also no entertainment licences issued to the plaintiff to run and manage the 'Bali Bali Cafe' in the building constructed by the plaintiff.

[59] By letter dated 19 March 2001, the defendant terminated the tenancy agreement for non-payment of rental.

[60] On 28 March 2001, the defendant as the landlord entered into the said land without any court order and sealed off the area and posted security guards. Again, on 16 April 2001 and on 17 April 2001, the defendant as the landlord through its servants or agents demolished all the structures and buildings on the said land with cranes and bulldozers. My learned brother Low Hop Bing JCA rightly said that the remedy of self help has been relegated into oblivion by virtue of s 7(2) of the Specific Relief Act 1950 and those assortment of cases cited by His Lordship. But when the defendant entered the said land, the tenancy agreement was already terminated by the defendant.

[61] Appellate interference should be exercised in favour of the defendant as the landlord. There was no proper evaluation of the evidence by the High Court and, consequently, there was a misdirection on the facts and the law warranting appellate interference. Wan Suleiman FJ in *Rasidin bin Partorjo v Frederick Kiai* [1976] 2 MLJ 214 speaking for the Federal Court sounded a warning that:

it would be wrong for the appellate court which had not seen or heard the witnesses to substitute its own finding of fact for that of the learned trial judge. A

[62] But appellate interference is encouraged and is permissible in such situations as envisaged by Gopal Sri Ram JCA (now FCJ) in *Renal Link (KL) Sdn Bhd v Dato' Dr Harnam Singh* [1997] 2 MLJ 373 at p 379: B

> Unless we, as a court of appeal, are convinced that there was no judicial appreciation of the evidence by the trier of fact, or that the audio-visual advantage reserved to a trial judge had been missed or that the findings made do not accord with the probabilities of the case when taken as a whole, it would not be open to us to intervene and upset the findings made by a trial judge. C

[63] Lord Reid in *Benmax v Austin Motor Co Ltd* [1955] 1 All ER 326 at p 329 observed as follows: D

> But in cases where there is no question of the credibility or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as good a position to evaluate the evidence as the trial judge, and ought not to shrink from that task, though it ought, of course, to give weight to his opinion. E

[64] In evaluating the available evidence, the plaintiff as the tenant was in clear breach of the terms of the tenancy agreement. The plaintiff had breached the express covenants of the tenancy agreement with impunity and this court will not lend its assistance to the plaintiff. It is quite apparent that the plaintiff is relying on its illegal acts in not procuring the building plan and the licence to operate the entertainment outlet in the building to advance its claim against the defendant. I have no hesitation in striking out the plaintiff's claim based on the *ex turpi causa non oritur actio* principle. It is a principle that is applicable to all causes of action including claims in tort. Beldam LJ delivering the judgment of the court in *Clunis v Camden and Islington Health Authority* [1998] QB 978 (CA), at p 987 had this to say about the *ex turpi causa non oritur actio* principle: F G H

> But whether a claim brought is founded in contract or in tort, public policy only requires the court to deny its assistance to a plaintiff seeking to enforce a cause of action if he was implicated in the illegality and in putting forward his case he seeks to rely upon the illegal acts. I

[65] And Lord Mansfield in *Holman et al' v Johnson, alias Newland* (1775) 98 ER 1120 at p 1121; 1 Cowp 341 at p 343 explained the *ex turpi causa non oritur actio* principle in broad terms in this way:

> No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.

[66] Statute wise, there is s 24 of the Contracts Act 1950 which enacts as follows:

> 24 What considerations and objects are lawful, and what not
>
> The consideration or object of an agreement is lawful, unless —
>
> (a) it is forbidden by a law;
>
> (b) it is of such a nature that, if permitted, it would defeat any law;
>
> (c) it is fraudulent;
>
> (d) it involves or implies injury to the person or property of another; or
>
> (e) the court regards it as immoral, or opposed to public policy.
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

[67] And the illustrations thereto contain examples of what would constitute lawful considerations and what would be considered unlawful and void. Hashim Yeop A Sani CJ (Malaya) had occasion to consider the legal ramifications of s 24 of the Contracts Act 1950 in *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356 at p 362 and this was what His Lordship said:

> Section 24 of the Contracts Act 1950 is explicit and that if an agreement is forbidden by law or prohibited by law or of such nature that it would defeat the law, that agreement is unlawful and void. If the agreement is prohibited by law or forbidden by law or of such nature that it would defeat the law then the question of public policy does not arise at all. The question of public policy arises only in para (e) where the court considers an agreement to be immoral or otherwise opposed to public policy.

[68] It is also instructive to consider two cases involving illegality arising out of a statutory prohibition. A good starting point would be the case of *In re An Arbitration v Mahmoud and Ispahani* [1921] 2 KB 716 (CA). In that case, the plaintiff, who had a licence to sell linseed oil, sold some to the

defendant in contravention of the Seed, Oils and Fats Order 1919. This statute made it an offence to buy or sell linseed oil without a licence. The defendant was unlicensed and he had induced the plaintiff to sell him the oil by a fraudulent representation that he was licensed. The defendant later refused to accept delivery of the oil and was sued for damages by the plaintiff. The Court of Appeal held that the plaintiff's claim failed because of the illegality of the contract. Despite the fact that the plaintiff was the innocent party, the legislation specifically prohibited any sale of oil to unlicensed persons.

[69] The case of *In re An Arbitration v Mahmoud and Ispahani* should be contrasted with a situation where an innocent party sues on a contract which is not ex facie illegal, but which is performed by the other party in an illegal manner. The case of *Archbolds (Freightage), Ltd v S Spanglett, Ltd (Randall, third party)* [1961] 1 All ER 417 would be a case in point. In that case, the defendants agreed to carry a load of whisky by road, from Leeds to London, for Archbolds. Archbolds were unaware that the vehicle to be used by the defendants did not have the correct licence in order to comply with s 1(1) of the Road and Rail Traffic Act 1933. The defendants, however, were aware of this fact. Somewhere on the route to London the goods were stolen as a result of the negligence of the defendants' driver. The defendants argued that they were not liable for damages because the contract was illegal by reason of the Road and Rail Traffic Act 1933. The court held that Archbolds were not debarred from recovering damages by the illegality of the defendants' use of their vehicle. Archbolds were innocent but that fact had not helped the plaintiff in *In re An Arbitration v Mahmoud and Ispahani*. But *Mahmoud* can be distinguished from *Archbolds* case by virtue of the nature of the statutory prohibition. In *Mahmoud*, the contract of sale to an unlicensed person was expressly forbidden. Whereas in *Archbolds*, the carriage of Archbolds' whisky was not as such prohibited. The Road and Rail Traffic Act 1933 merely regulated the manner in which carriers should transport goods. The contract was not, therefore, expressly forbidden by the statute and the plaintiffs were entitled to damages.

[70] In sharp contrast, here we are concerned with the tenancy agreement between the plaintiff and the defendant and the evidence showed that the plaintiff as the tenant failed to fulfil its obligations which it assumed under the tenancy agreement. The plaintiff as the tenant failed to comply with the statutory provisions affecting the vacant land and the use thereof arising from the tenancy agreement.

[71] I agree with my learned brother Low Hop Bing JCA that the facts, as unfolded, do not attract the application of s 7 of the Specific Relief Act 1950 read with s 8 of the same Act.

[72] This appeal concerned the illegal performance of a perfectly legal contract. Given the specific and admitted breaches of the plaintiff as the tenant, the plaintiff was certainly disentitled to seek specific relief under the Specific Relief Act 1950. It was rightly submitted that the tenancy agreement was nothing more than an empty contract or in *latin nudum pactum*. In a gambling contract in the case of *Pet Far Eastern (M) Sdn Bhd v Tay Young Huat & Ors* [1999] 5 MLJ 558 at p 578, I had this to say when I was sitting on the High Court bench:

> A transaction of this nature must be void as the Malaysian law does not recognise a gambling contract. Put it in another way, the Malaysian law does not recognise gambling contracts or transactions and these are considered void. In Latin language, it is nudum pactum. In English, it means an empty contract. As an empty contract, no legal right or liability can arise from it.

[73] Continuing on the same page, I had this to say:

> ... no civilised judicial system of law can sit back and smile and act nonchalantly as if nothing has happened. This court must act swiftly and strike down an illegal contract.

[74] With respect, what I said in *Pet Far Eastern* must apply with equal force to the present appeal at hand. The Specific Relief Act 1950 do not apply to the peculiar facts of the present appeal. The building constructed by the plaintiff as the tenant was without approval of 'DBI' and there was no entertainment licence issued to the plaintiff. In these circumstances, it would be next to impossible for the plaintiff to seek the aid of this court to invoke the Specific Relief Act 1950. To confound the matter further, the tenancy as envisaged under the tenancy agreement had become impossible and, in consequence, void under s 33 of the Contracts Act 1950.

[75] I shall now consider the plaintiff's cross-appeal against the dismissal of the plaintiff's claim for exemplary and aggravated damages. Now, before damages can be recovered in an action there must be a wrong committed and that wrong may be in tort or, like the present appeal, for breach of contract. Even if a loss has been incurred, damages cannot be awarded in the absence of a wrong. Lord Wright aptly said in *Hay or Bourhill v Young* [1943] AC 92 at p 106:

> Damage due to the legitimate exercise of a right is not actionable, even if the actor contemplates the damage. It is *damnum absque injuria*. The damage must be attributable to the breach by the defendant of some duty owing to the plaintiff.

[76] So, the preliminary question to pose before any issue of damages can arise is this: whether a wrong has been committed? Put differently, has the plaintiff proved the defendant's liability?

[77] The purpose of exemplary damages is to punish. And the quantum of the exemplary damages may be influenced by the size of the compensation sought even to the extent of exceeding the size of the compensation itself. In *Rookes v Barnard & Ors* [1964] AC 1129 at p 1228, Lord Devlin observed that:

> .... a jury shouId be directed that if, but only if, the sum which they have in mind to award as compensation (which may, of course, be a sum aggravated by the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then it can award some larger sum.

[78] In *Bradford City Metropolitan Council v Arora* [1991] 2 QB 507 (CA), the Court of Appeal while acknowledging that exemplary damages should be awarded only where compensatory damages are inadequate to punish the defendant, upheld an exemplary award of the industrial tribunal.

[79] In *Sallows v Griffiths* [2001] FSR 15 (CA), the court refused to order exemplary damages because it considered that the compensatory award was adequate. In *Drane v Evangelou & Ors* [1978] 1 WLR 455 (CA), both Lawton and Goff LJJ thought it was justifiable to amalgamate aggravated damages with exemplary damages.

[80] Now, in order to succeed in its claim for exemplary and aggravated damages, the plaintiff as the tenant must prove that the defendant as the landlord was liable. Sadly, the plaintiff failed to prove the defendant's liability and that being the case, the plaintiff was not entitled to any damages be it exemplary or aggravated.

[81] Lee Gim Aik gave evidence on two occasions. The first occasion was when he took the witness stand on behalf of the plaintiff and testified on the issue of liability. In fact, he was the only witness for the plaintiff on the issue of liability. The plaintiff then closed its case on liability on 18 April 2002.

[82] The second occasion when Lee Gim Aik gave evidence was on 9 November 2006 on the issue of quantum. He gave evidence on behalf of the plaintiff, in his purported capacity as the director of the plaintiff, and not in his individual capacity. Sadly, Lee Gim Aik was, as at 9 November 2006, an

undischarged bankrupt, and this fact was withheld from the High Court (*The Topps Co Inc v Mally Jaya Sdn Bhd* [1998] 5 MLJ 744, per Low Hop Bing J (now JCA)).

[83] In holding himself out as a director of the plaintiff at the proceedings before the High Court on 9 November 2006, and at which date the said Lee Gim Aik was already adjudged a bankrupt, the said Lee Gim Aik had acted in contravention of the law — particularly s 125(1) of the Companies Act 1965. His conduct in holding himself out as a director at the point of time when he was disqualified by law from acting as a director must be construed adversely against him. The trustworthiness and the credibility of his evidence are greatly undermined (*Leasing Corporation Sdn Bhd v Indah Lestari Sdn Bhd* [2007] 7 MLJ 506 (CA), per Zulkefli JCA (now FCJ)).

[84] It goes without saying that the entire evidence of Lee Gim Aik on the issue of damages must be disregarded by this court.

[85] What is now left for me to do is to make those orders as made by my learned brother Low Hop Bing JCA. I now make those orders accordingly.

Defendant's appeal allowed and plaintiff's cross-appeal dismissed with costs.

Reported by Kohila Nesan